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IN THE

Supreme Court of the United States

October Term, 1940.

No. 464.

TSUNE-CHI YU,

Petitioner,

AGAINST

CARL BYOIR AND ASSOCIATES, INC.,

Respondent.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Counsel for Respondent.

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Brief in Opposition to Granting of Writ of Certiorari.

Opinions Below.

The opinion below of the United States Circuit Court of Appeals for the Second Circuit appears at Record, pages 17, *et seq.*, and is reported in 112 F. 2d 885.

The opinion of the United States District Court for the Southern District of New York appears at Record, page 13 and is not reported.

Statement of the Case.

The petitioner is herein designated as the defendant, and the respondent as the plaintiff.

This action is now pending in the District Court of the United States for the Southern District of New York. The Circuit Court of Appeals reversed an order of the

District Court and judgment entered thereon dismissing the complaint (R. 11).

The order of reversal and the mandate based thereon remanded the suit to the District Court, whereafter a motion was made by the defendant for an order directing the service of a bill of particulars by the plaintiff, and, in addition or in the alternative, for the striking out of paragraphs III and IV of the complaint. The motion for a bill of particulars was granted but the application to strike out aforesaid paragraphs of the complaint was denied.

Thereupon, a bill of particulars was served by the plaintiff, and thereafter, on the 14th day of September, 1940 an answer was served by the defendant.

The action, therefore, is now at issue and awaiting trial.

Plaintiff is a New York corporation which, pursuant to contract, performed work, labor and services and expended money on behalf of the Republic of China (R. 3). Said Government, being indebted to plaintiff for said work, labor and services and expenditure of money in the sum of $83,056.49, in August of 1938 remitted to the defendant, its Consul in New York, the sum of $22,000 for the express purpose of paying same to plaintiff (R. 3, 4). Plaintiff alleges that said moneys were received by the defendant in trust for this purpose, that the defendant failed to carry out his agreement or execute the trust, and converted the moneys to his own use (R. 4).

The defendant moved to dismiss on the ground that the suit was an indirect attempt to enforce a claim against a friendly foreign government, and upon the further ground that the Chinese Government was an indispensable party to the action (R. 6).

ARGUMENT.

POINT I.

There being no extraordinary question involved herein, there is no adequate reason why certiorari should be granted after answer and before final hearing and judgment.

Hamilton Brown Shoe Co. v. *Wolf*, 240 U. S. 251.

POINT II.

The present suit is not against the Chinese Government.

Judge Patterson, writing for the Circuit Court of Appeals, said as follows (112 F. 2d 885, 886):

> "The suit is no more against the Chinese Government than an action by A to recover from B moneys sent by the United States to B in trust for A would be an action against the United States. The defendant himself, though consul of a foreign government, is not immune from suit in the federal courts. Judicial Code, section 256, 28 U. S. C., §371, 28 U. S. C. A., §371; *United States* v. *Ravara*, 2 Dall. 297, 1 L. Ed. 388; *Savic* v. *City of New York*, 203 App. Div. 81, 196 N. Y. S. 442."

POINT III.

The complaint showing that the defendant received money in trust for the plaintiff and defendant not having lived up to his trust, the plaintiff may sue.

McKee v. *Lamon,* 159 U. S. 317;
Sayer v. *Wynkoop,* 248 N. Y. 54;
Scott on Trusts, sections 198.1-198.3.

POINT IV.

Petitioner's contention that this suit is an indirect attempt to enforce a claim against the Chinese Government, is baseless.

Accepting as true the allegations of the complaint, it appears that the Chinese Government has not one iota of interest in the moneys received by the defendant. It parted with these moneys when it paid them over to defendant for the purpose of having them applied on the indebtedness due plaintiff.

Lamont v. *Travelers Insurance Company,* 281 N. Y. 362.

POINT V.

The immunity of the Republic of China was not properly presented.

No person has appeared on behalf of the Chinese Republic to claim immunity from suit. So far as appears, the State Department has not even been consulted. In

the absence of such action, the claim of immunity is not properly before the Court.

In re Muir, 254 U. S. 522;
The Pesaro, 255 U. S. 216.

Where the foreign sovereign fails to assert its immunity or appear in the action, immunity is waived and the suit proceeds.

The Sao Vicente, 281 F. 111;
Porto Rico v. *Ramos*, 232 U. S. 627, 34 S. Ct. 461;
De Simone v. *Transportes Maritimos Do Estado*, 199 App. Div. 602.

CONCLUSION.

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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OTTO C. SOMMERICH,
Counsel for Respondent.